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Via Facsimile & U.S. Mail

August 23, 2006

Karl Fingerhood
U.S. Department of Justice
Environmental Enforcement Section
U.S. Department of Justice
ENRD Mailroom, Room 2121
601 D. Street, N.W.
Washington, D.C. 20044-7611

Tali Jolish
Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105

J. Thomas Boer
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105

Re: United States V. Powerine Oil Company et al.
Civil No. CV-04-6435 PA(JWJX) USDC C.D. Cal.

Dear Tali, Tom and Karl:

Thank you very much for your letter dated August 18, 2006. We, like you, agree that it is in the best interest of all the parties to devote our efforts to speedy resolution of this matter and very much appreciate the government's proposal. We have seriously considered the issues addressed in your letter and offer the following response.

1. ADDITIONAL INFORMATION

Enclosed is a copy of the purchase agreement for CENCO's refinery equipment. We also wanted to thank you for the additional insurance information.

2. POWERINE'S BANKRUPTCY DEFENSE

In your letter you state that you do not believe that the United States' claim with respect to the WDI Site was affected by Powerine's 1984 bankruptcy proceedings. We, of course, disagree with the government's position. We thought, therefore, that it would be helpful to explain the basis for our position.

On June 9, 1981, Powerine, pursuant to § 103(a) of the CERCLA, filed a § 103 notice with EPA informing EPA that it had disposed of wastes at the "Los Nietos Dump" in Santa Fe Springs,



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California. As you are aware, the name "Los Nietos Dump" is an alias for Waste Disposal, Inc. Indeed, as evidence that Powerine disposed of wastes at the WDI Site, EPA provided Powerine with a copy of the 103(c) notice and stated that "[t]he notifications include mention of the disposal of wastes from 'petroleum refinery operations' at the 'Los Nietos Dump,' an alias for Waste Disposal" (Exhibit 7).

While we believe that EPA was aware of the state's concerns about releases at the WDI Site before December 4, 1984, we know that it was aware of such concerns by that date. On December 4, 1984, the California Department of Health Services ("DHS") sent a letter to Adeline Bennett, one of the property owners, informing her that her property was being evaluated for inclusion on the State of California's Priority Ranking List. A copy of this letter was sent to Keith Takata of EPA (Ex. 4 to Rosenbloom Declaration ("R Decl.")).

Also in December, 1984, DHS sent EPA a copy of the Preliminary Assessment Summary ("PAS") and Preliminary Assessment ("PA") for the WDI Site (R Decl. Exs. 1, 2, 3), both of which confirmed that the site had been used to accept a wide variety of wastes over a period of years and that a site characterization performed by the City of Santa Fe Springs demonstrated that the WDI Site was contaminated with hazardous substances including toluene and TCE. The PAS recommended that additional testing be performed and stated that "high priority is recommended because of the history of unregulated dumping, large volume of material, proximity to groundwater, proximity to school, and future development plans." It was this information that led to the listing on the NPL (Ex. 7).

EPA was clearly aware of these documents at the time because, on January 18, 1985, Barbara Resnick, Regional Site Planning Officer, wrote a memo to Jeff Rosenbloom, EPA's Site Screening Coordinator, stating that she concurred "with the DHS recommendations, I think that the Waste Disposal, Inc. site should be Active. Its history of unregulated and abundant dumping, preliminary profile, proximity to the public and plans for future development . . . evidence the need for further investigation" (emphasis in original) (Ex. 5). In addition, on February 1, 1985, Jeff Rosenbloom entered a notation on a copy of the PA stating that an "investigation is warranted for this facility due to dumping of hazardous wastes and close proximity of groundwater wells" (Ex. 3).

On March 15, 1985, DHS sent a letter to EPA informing EPA that the WDI Site had been listed on the State Superfund list and identifying the WDI Site as a site which DHS believed qualified for inclusion on the NPL. DHS informed EPA that it has scored the site using the Federal ranking system and that the score exceeded the threshold for listing on the NPL.

Thus, it is absolutely clear that by March, 1985, EPA knew that (a) hazardous wastes had been disposed at the WDI Site; (b) the WDI Site had a history of unregulated dumping; (c) the City of Santa Fe Springs had investigated the WDI Site and determined that there had been releases of hazardous substances including toluene and TCE; (d) the WDI Site had been listed as a State Superfund Site; (e) the WDI Site qualified for listing as a Federal Superfund Site; (f) the site should be considered "active" or "high priority" because of the above factors and its proximity to groundwater and a school; (g) additional investigation and remediation were required; and (h) Powerine had disposed of wastes at the WDI Site. In addition, EPA had already incurred response costs related to the WDI Site. Jeff Rosenbloom states in his declaration that the



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State's activities were considered response costs and that he kept time sheets for his activities, including his WDI activities, so that EPA could recover the costs from PRPs (R Decl. ¶ 12).

Moreover, EPA was fully aware of Powerine's bankruptcy proceedings. On May 10, 1984, the Debtor filed its Schedules of Assets and Liabilities which listed the EPA as having, among other claims, a claims for "waste disposal cleanup charges." This was served on EPA. The bar date for filing proofs of claim was fixed March 1, 1985 (the "Bar Date") and EPA was given notice of the Bar Date. Although EPA filed proofs of claim related to the Stringfellow site, which were later withdrawn, it never filed a proof of claim regarding the WDI. The confirmation plan, approved on July 10, 1985 (the "Discharge Date"), discharged all claims that arose prior to that date and enjoined any creditors from instituting any actions regarding such debts.

The Ninth Circuit is likely to apply the "fair contemplation" test to determine whether an environmental claim such as the WDI Site claim arose prior to confirmation. As the Ninth Circuit held in *California Department of Health Services v. Jensen*, 995 F. 2d 925 (9th Cir. 1993), that test "provides that 'all future response and natural resource damages contemplated by the parties at the time of [d]ebtors' bankruptcy claims are claims under the [Bankruptcy] Code.'" (citing *In re National Gypsum*, 139 B.R. 397, 409 (N.D. Tex. 1992)). Thus, claims regarding "costs associated with pre-petition conduct resulting in a release or threat of release that could have been 'fairly' contemplated by the parties," prior to the discharge are considered pre-discharge claims.¹ The Ninth Circuit cited to various "indicia of fair contemplation" identified in *In re National Gypsum* 139 B.R. 397 (N.D. Tex. 1992). These included (a) NPL listing; (b) commencement of investigation and cleanup activities; and (c) incurrence of response costs. The Ninth Circuit also cited to *In re Chicago, M., St. P. & P.R.R.*, 974 F. ed 775 (7th Cir. 1992) in which the Seventh Circuit noted that factors which it should be considered included whether the debtor could be tied to a release and whether testing had been conducted revealing a contamination problem. While it is not necessary that these exact factors be present in order to meet the "fair contemplation" test, in this case we will be able to establish all of these factors. Therefore, we are confident that the Court will find that the WDI claim was within EPA's fair contemplation and, therefore, was discharged. Thus:

(a) NPL Listing: EPA knew that the WDI Site had been scored by the State of California using the Federal scoring system, that the score exceeded the level required for listing on the Federal NPL, and that the state had listed the Site as a State Superfund Site. In addition, EPA was already in the process of evaluating the site for listing on the NPL;

(b) Commencement of Investigation: EPA was aware that the City of Santa Fe Springs had investigated the WDI Site and that additional site investigation was warranted. EPA had already determined that the site should be considered "active" and was investigating the site to determine whether to list it on the NPL;

(c) Incurrence of Response Costs: EPA had incurred response costs to (i) fund the State's investigation and scoring of the WDI Site; and (ii) analyze the materials provided by the

¹ Other Courts have applied more lenient tests.



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State to determine whether to process the site for listing on the NPL and, indeed, was keeping records so that it could recover these costs from the PRPs;

(d) Debtor Tied to Release: EPA knew that Powerine had disposed of wastes at the WDI Site because it disclosed this to EPA in 1981;² and

(e) Contamination Problem Identified: EPA was aware that large quantities of wastes had been disposed of at the WDI Site and testing performed by the City of Santa Fe Springs demonstrated that releases of hazardous substances, including toluene and TCE, had occurred.

In sum, Powerine believes that it has a very strong argument that EPA's WDI Site claim was fairly contemplated and, therefore, was discharged in the bankruptcy. If Powerine prevails, not only will EPA's claims be dismissed,³ but Powerine may be able to recover its damages including its attorneys fees because EPA violated the discharge order.⁴

3. POWERINE'S ALLEGED CERCLA LIABILITY

Third, in your letter you state that you are confident that you have sufficient evidence to establish your CERCLA claim. However, we have reviewed all of the materials you have provided us and believe that EPA is going to have serious problems proving its case. We note, for example, that virtually all of the witnesses whose declarations have been provided are deceased. We will, of course, object to the admissibility of declarations from individual whom we cannot depose. In addition, as EPA well knows, it is not enough that it prove that "wastes" were sent to the site, it must prove that "hazardous substances," as that term is defined in CERCLA,

² Any claim by EPA that it was not aware of Powerine's involvement at WDI because the disclosure used the term "Los Nietos Dump," rather than "WDI Site," and described the site as being between Painter Ave. and Greenleaf St., rather than between Greenleaf and Santa Fe Springs, i.e. immediately to the west, is unavailing. As noted above, EPA itself cited the 103(c) notice and the referral to the "Los Nietos Dump" as evidence that Powerine disposed of wastes at the WDI Site. Indeed, it appears clear that it was the 103(c) notice that led EPA to issue a notice letter to Powerine. The letter clearly demonstrates that EPA was not concerned about the street description. In fact, Powerine also sent another 103(c) notice which referred to disposals "off Los Nietos" and EPA stated that this "may [also] be related to Waste Disposal."

³ If the claim was discharged, there could not have been a fraudulent conveyance. Therefore, that claim would be discharge as well. In addition, the Discharge Order prohibited EPA from "instituting . . . any action or employing any process or engaging in any act to collect such debts." Because the purpose of the 104(e) requests at issue was to obtain information so that EPA could collect its alleged debt, the serving of the 104(e) requests was prohibited by the Discharge Order. Therefore, the 104(e) claim will be dismissed as well.

⁴ We note that Powerine told the government on numerous occasions over the years that its position was that the claim had been discharged in the bankruptcy proceedings. Rather than follow established Justice Department policy and seek approval from the Bankruptcy Court to proceed, the government decided to pursue Powerine anyway. We believe that the Court is likely to look askance at how the government proceeded in this case.



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were disposed of at the site. None of the declarations or documents produced to date by EPA identify any "hazardous substances" that were disposed of at the site by Powerine. In response to the interrogatories served by Powerine, the United States failed to identify a single hazardous substance that was disposed of by Powerine at the WDI Site. Therefore, we believe that there is a significant chance that the United States will not prevail on its CERCLA claims.

4. THE 104(e) REQUESTS

Fourth, you note that we fail to address the penalties that could be imposed for the alleged failure to respond to the 104(e) information requests. EPA alleges that Powerine failed to comply in a timely manner with its 104(e) requests and alleges that EMC unreasonably failed to timely comply with its 104(e) requests. As noted above, we believe that this claim will be dismissed because the CERCLA claim was discharged in the bankruptcy.

With regard to the claim that Powerine failed to reply in a timely manner or failed to completely respond, we note that EPA propounded multiple requests for information pursuant to section 104(e) over many years and, even according to EPA, Powerine adequately responded to all but the last. Even with regard to that request, Powerine responded by providing responsive documents or objecting to the requests as irrelevant or legally improper. Powerine was in regular contact with EPA regarding the requests. In July, 1999, EPA informed Powerine that if it did not respond EPA would seek penalties. Powerine responded shortly thereafter. The Court may only impose penalties if Powerine "unreasonably" failed to comply. We are highly doubtful that a Court will find that Powerine acted unreasonably.⁵

Even if it does, we think it unlikely the Court would impose a significant penalty. In *United States v. Taylor*, 8 F.3d 1074, 1078 (6th Cir.1993) the Court noted that "[C]ourts have identified the following factors, among others, as bearing on the amount of a penalty: (1) the good or bad faith of the defendant, (2) the injury to the public, (3) the defendant's ability to pay, (4) the desire to eliminate the benefits derived by a violation, and (5) the necessity of vindicating the authority of the enforcing party." None of these are present here. The fact that Powerine previously satisfactorily responded to numerous 104(e) requests and was in contact with EPA is evidence that it was not acting in bad faith. There was no injury to the public as a result of Powerine's alleged failure. Powerine had already provided EPA with information regarding the site itself, the questions only related to economic issues and the site investigation was continuing. As EPA is aware, Powerine has very limited ability to pay and the funds would be better utilized to clean up the refinery site. Powerine never benefited from the alleged delays and, given that Powerine did, in fact, respond, there is no need to vindicate EPA's authority. Therefore, we are confident that the Court will not impose any significant penalty if it imposes any penalty at all.

⁵ Similarly, EMC objected to the requests because they did not relate to the investigation and remediation. On December 14, 2000, EPA informed EMC that if it failed to comply immediately, it would seek penalties. EMC did respond immediately on December 31, 2000 and supplemented its responses on January 8, 2001.



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5. THE ROTHSCHILDS

In your letter you state that because we have asked the United States to include the Rothschilds in any proposed settlement, we do not see why they would not cooperate with us in attempting to pursue any possible insurance proceeds for both WDI and the refinery site. You then offer to make their cooperation a condition to their participation in any consent decree. As you are aware, we are currently involved in litigation with the Rothschilds. We sued the individual Rothschilds in the *United States v. Powerine* case and they counterclaimed against us and we sued the estates of Harry and Josephine Rothschild in another case and they have counterclaims against us there as well. Therefore, we are not presently cooperating and we cannot assure any future cooperation. We therefore think that your suggestion about conditioning their release on their cooperation may be helpful.

6. CLEAN UP OF THE REFINERY SITE

In your letter you state that your proposal is based on our commitment to remediate the former refinery Site pursuant to an agreement with the City of Santa Fe Springs. We would appreciate clarification as to the type of agreement to which you are referring. As you know, we are already under RWQCB Cleanup and Abatement Order #97-118 to perform this work and the City holds an injunction compelling full adherence with the CAO. Therefore, we do not understand why a separate agreement would be necessary.

7. POWERINE'S OFFER

In our June 28, letter, Powerine offered to pay \$1.2 million to resolve this matter. We noted, however, that given Powerine's financial condition and what Powerine perceived to be a very strong litigation position, particularly with regard to the bankruptcy discharge, Powerine did not foresee being in a position to offer more than this amount in settlement. As set forth in considerable detail above, nothing in your letter has persuaded us that our evaluation of the case should change.

At the same time, we recognize that the United States has made a substantial move forward in an attempt to resolve this matter and, as we have expressed in the past, we would also like to resolve this matter without the need to engage in expensive and time consuming litigation. Therefore, if we can resolve this matter quickly without the need to engage in additional litigation, Powerine is willing to pay \$1.45 million - \$1 million to be paid within 90 days after the District Court approves a consent decree, an additional \$225,000 within sixty days thereafter, and an additional \$225,000 sixty days after the second payment, in exchange for releases, covenants not to sue and contribution protection for Powerine and the Rothschild's for the WDI, OII and Casmalia disposal sites.



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We would welcome the opportunity to discuss this matter with you at your earliest convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "AMC", with a long horizontal line extending to the right.

Albert M. Cohen
of Loeb & Loeb LLP

AMC:ee
07152010002
LA1569515.1

cc: Vincent J. Papa
Michael Egner
Dave Isola